UNITED STATES BANKRUPTCY COURT

DEPARTMENT 1

JUDGE MARGARET M. MANN, PRESIDING

THURSDAY, NOVEMBER 13, 2014

10:00 AM

1 - 11-18565-MM Ch 7 VICTOR E FERNANDEZ & MARIA A SEGOVIA-FERNANDEZ

OPPOSITION TO MOTION TO REOPEN CASE FILED BY MARK BURDETTE, DC

Tentative Ruling: On October 6, 2014, the Debtors filed a motion to reopen their bankruptcy; it appears that they sought to reopen the case to add at least one creditor to their schedules. Mark Burdette, DC opposed the motion to reopen on the grounds that debtors had accrued a new debt to him of $5,815.00 after the date of discharge.

This is a Chapter 7 "no asset/no bar date" case. Reopening a case to add an omitted creditor is not necessary in a Chapter 7 "no asset/no bar date" case (where the court sent a notice directing creditors not to file a proof of claim). (Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors & Deadlines, filed on November 15, 2011, as Docket Entry No. 4); *see also,* 4 March, Ahart and Shapiro, California Practice Guide: Bankruptcy, ¶ 23:133 at 23-15 (2013). Relief to reopen this "no asset/no bar date" case and add a creditor to the schedules is unnecessary because if the omitted debt is dischargeable under Section 523(a)(3)(A) of the Bankruptcy Code, it was already discharged under Section 727 of the Bankruptcy Code. As held by the United States Court of Appeals for the Ninth Circuit in *In re Beezley,* 994 F.3d 1433, 1434 (9th Cir. 1993), amending the schedules does not affect this situation. As a result, the Motion to Reopen is denied.

That said, the discharge received on February 14, 2012 only discharged debts obtained prior to this date. Based on Mark Burdette, DC's declaration it appears that $2,310.00 was incurred as of the petition date of November 14, 2011 and the remaining bill $5,815.00 was incurred after the petition date. To the extent that any part of the debt accrued after the petition date, the discharge would not affect it.

The Court will hear this matter.

ATTORNEY: ANDREA WHITEHILL (VICTOR & MARIA FERNANDEZ)
OTHER: MARK BURDETTE

2 - 12-02018-MM Ch 13 CATALINA HARMAN

OPPOSITION TO TRUSTEE'S NOTICE OF INTENT TO RECONSIDER AND REALLOW PROOF OF CLAIM #3 OF WELLS FARGO BANK FILED BY DEBTOR

Tentative Ruling: Continued to November 25, 2013 at 10:00 a.m., Department 1 to be heard on the chapter 13 calendar. Appearances at the November 11, 2014 hearing are excused.

ATTORNEY: EUGENIO RAMOS (CATALINA HARMAN)
ATTORNEY: ERIN HOLLIDAY (WELLS FARGO BANK)

10:00 AM

3 - 12-06689-MM Ch 7 TREASURES, INC.

ADV: 14-90066 LEONARD ACKERMAN, TRUSTEE v. ROBERT MICHAEL, LTD

PRE-TRIAL STATUS CONFERENCE

ATTORNEY: DEAN T. KIRBY (LEONARD ACKERMAN, TRUSTEE)
ATTORNEY: JAMES R. FELTON (ROBERT MICHAEL, LTD)

4 - 12-13180-MM Ch 7 TAIKUN INVESTMENTS, INC

1) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR DEAN JOHNSON, ACCOUNTANT

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by R. Dean Johnson, Accountant to Chapter 7 Trustee, for fees of $4,847.00 and expenses of $418.12; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. R. Dean Johnson may upload an order granting the Application in full as requested.

2) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR FINANCIAL LAW GROUP, ATTORNEY FOR TRUSTEE

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by Financial Law Group, Attorney for Chapter 7 Trustee, for fees of $11,842.00 and expenses of $160.02 plus up to $1,000.00 for actual and necessary fees and up to $20.00 for expenses to attend the fee application hearing and close the case; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Financial Law Group may upload an order granting the Application in full as requested.

ATTORNEY: STANLEY H. HAYNES JR. (TAIKUN INVESTMENTS, INC.)
ATTORNEY: STEPHEN K. HAYNES (TAIKUN INVESTMENTS, INC.)

10:00 AM

5 - 13-08814-MM Ch 7 THOMAS W. JURANCICH

1) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR DEAN JOHNSON, ACCOUNTANT

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by R. Dean Johnson, Accountant for Chapter 7 Trustee, for fees of $1,294.00 and expenses of $69.30; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. R. Dean Johnson may upload an order granting the Application in full as requested.

2) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR CHRISTOPHER BARCLAY, TRUSTEE

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by Christopher Barclay, Chapter 7 Trustee, for fees of $3,487.60 and expenses of $130.53; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Christopher Barclay may upload an order granting the Application in full as requested.

3) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR YOSINA LISSEBECK, ATTORNEY FOR TRUSTEE

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by Lissebeck Law, Attorneys for Chapter 7 Trustee, for fees of $2,971.00 plus reserve of $500.00 and expenses of $28.92; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Lissebeck Law may upload an order granting the Application in full as requested.

ATTORNEY: DAVID G. WEIL (THOMAS JURANCICH)

6 - 13-10929-MM Ch 7 LADY KATERINE NASTOPKA

ADV: 14-90024 GUGGENHEIM CAPITAL, LLC & GUGGENHEIM PARTNERS, LLC v. LADY KATERINE NASTOPKA

TELE

PRE-TRIAL STATUS CONFERENCE (fr. 10/16/14)

ATTORNEY: JASON STRABO (GUGGENHEIM CAPITAL, LLC, GUGGENHEIM PARTNERS, LLC)
OTHER: LADY KATERINE NASTOPKA

7 - 14-07595-MM Ch 13 GREGORY ARTHUR & TYRA ADINE DROEGEMUELLER

MOTION FOR RELIEF FROM STAY, RS #SMK-1 FILED BY DEUTSCHE BANK NATIONAL TRUST COMPANY

ATTORNEY: BILL PARKS (GREGORY & TYRA DROEGEMUELLER)
ATTORNEY: SHERI KANESAKA (DEUTSCHE BANK NATIONAL TRUST COMPANY)

10:00 AM

8 - 14-08130-MM Ch 13 HENDRIX F NOWELLS

MOTION TO EXTEND AUTOMATIC STAY FILED BY DEBTOR

Tentative Ruling: Motion to Extend Automatic Stay is GRANTED. The Court finds that there is not a presumption of bad faith because the Debtor's income has changed since his most previous case. *See* 11 U.S.C. § 362(c)(3)(C)(i)(III)(bb). Debtor has represented that he has altered his business strategy, resulting in an increase and stabilization of income. Per unopposed motion, the Debtor has established that this chapter 13 petition was filed in good faith. Appearances are excused and Debtor may upload an order.

ATTORNEY: KERRY A. DENTON (HENDRIX NOWELLS)

9 - 14-08178-MM Ch 13 PHENG MOUA

MOTION TO EXTEND AUTOMATIC STAY FILED BY DEBTOR

Tentative Ruling: Motion to Extend Automatic Stay is GRANTED. The Court finds that there is not a presumption of bad faith because the Debtor's financial and employment affairs have substantially changed since the discharge of his last case. *See* 11 U.S.C. § 362(c)(3)(C)(i)(III)(bb). The Debtor's prior bankruptcy case, pending within the preceding 1-year period, was converted to chapter 7 because the Debtor became unemployed and was unable to adequately fund the proposed chapter 13 plan. Debtor submitted a declaration in support of his motion stating that he has secured two jobs and become self-employed since the conversion of his last case. He states than his employment and rising income will enable him to fund a chapter 13 plan and retain his home. Thus, per unopposed motion, Debtor's statements provide "clear and convincing evidence" that this plan was filed in good faith. *See* 11 U.S.C. § 362(c)(3)(C). Provided that no parties file opposition to this motion, appearances are excused and Debtor may upload an order. If opposition is timely filed, the Court will hear the matter

ATTORNEY: CRAIG S. TRENTON (PHENG MOUA)

11:00 AM

1 - 11-17068-MM Ch 7 LYRIC OPERA SAN DIEGO

MOTION FOR RECONSIDERATION OF FEE AWARDS FILED BY CHRISTINE BAUR

Tentative Ruling: Continued to December 4, 2014 at 11:00 a.m., Department 1 due to a scheduling conflict of the chapter 7 Trustee. Ms. Bauer is to file additional briefing by November 28, 2014, regarding her standing to seek reconsideration of the chapter 7 trustee's fee request. A person has standing if he or she is a "person aggrieved" by a bankruptcy order, which means that "the order must diminish the movant's property, increase its burdens, or detrimentally affect its rights." *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.),* 177 F.3d 774, 777 (9th Cir. 1999). Appearances at the Novermber 13, 2014 hearing are excused.

OTHER: CHRISTINE BAUR

11:00 AM

2 - 11-19072-MM Ch 13 ISIDRO GONZALEZ

MOTION FOR RELIEF FROM STAY, RS #GAR-1 FILED BY NATIONSTAR MORTGAGE, LLC

ATTORNEY: GEORGE PANAGIOTOU (ISIDRO GONZALEZ)
ATTORNEY: GAIL A. RINALDI (NATIONSTAR MORTGAGE, LLC)

3 - 14-06348-MM Ch 7 AUGUSTO & LEA EJANDA

REAFFIRMATION AGREEMENT BETWEEN DEBTORS AND AMERICAN HONDA FINANCE CORPORATION

ATTORNEY: STEVEN W. HASKINS (AUGUSTO & LEA EJANDA)

4 - 14-06868-MM Ch 7 ADAN GILBERTO & CLAUDIA MARICELA ZAVALA

REAFFIRMATION AGREEMENT BETWEEN DEBTORS AND TOYOTA MOTOR CREDIT CORPORATION

ATTORNEY: MARK A. NELSON (ADAN & CLAUDIA ZAVALA)

5 - 14-07022-MM Ch 7 BRIAN TOSHIO LINGLE

REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND WELLS FARGO DEALER SERVICES

ATTORNEY: DANIEL WIEDECKER (BRIAN LINGLE)

6 - 14-07414-MM Ch 7 CHRISTEN MARIE SOTO

REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND NAVY FEDERAL CREDIT UNION

ATTORNEY: DAVID G. WEIL (CHRISTEN SOTO)

7 - 14-07600-MM Ch 7 GRACE ELIZABETH KILPATRICK REINHARDT

REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND GATEWAY ONE LENDING & FINANCE

ATTORNEY: DAVID G. WEIL (GRACE REINHARDT)

02:00 PM

1 - 12-15328-MM Ch 11 PB REDELL, INC.

1) MOTION FOR APPROVAL OF DISCLOSURE STATEMENT FILED BY DEBTOR (fr. 10/2/14)

Tentative Ruling: The Court has been having trouble reading the document your office has filed electronically and requests your compliance with our procedures.

Pursuant to our Court's Electronic Court Filing Manual, a document file created with a word processor, or a paper document which has been scanned, must be converted to Portable Document Format (".pdf") to be electronically filed with the Court. Electronic documents can be converted to .pdf directly from your original software application (e.g., Microsoft Word® or Corel WordPerfect®, petition software). Documents which exist only in paper form must be scanned into .pdf format for electronic filing. This can be done from an appropriate scanning machine and/or a copy machine. Therefore, if scanning your document from your copy machine and/or scanner to create to a .pdf, your copy machine or scanner must have the appropriate Dots Per Inch ("DPI") setting in order to have the best readable copy uploaded. Set your scanner or copy machine default to black and white, as color triples the size of the .pdf. The DPI should be set at 300. The paper document being scanned must be 8-1/2 x 11 inches to avoid any errors in the uploading and/or noticing of the .pdf document.

Please either have your documents directly created into .pdf from your word processing software and/or adjust your copy machine or scanner to the appropriate DPI setting. Please refile the Status Report on Plan Confirmation pursuant to these guidelines.

2) MOTION FOR APPROVAL OF CHAPTER 11 PLAN FILED BY DEBTOR (fr. 10/2/14)

Tentative Ruling: To be heard.

3) SECOND INTERIM FEE APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR SMAHA LAW GROUP, ATTORNEY FOR DEBTOR

Tentative Ruling: The Court having considered the Second Interim Application for Professional Compensation (the "Application") filed by John L. Smaha, Debtor's Attorney, for fees of $206,011.25 and expenses of $8,180.12; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. John L. Smaha may upload an order granting the Application in full as requested.

US TRUSTEE: DAVID A. ORTIZ
ATTORNEY: GUSTAVO E. BRAVO (PB REDELL, INC.)

02:00 PM

2 - 12-16423-MM Ch 11 IMAGENETIX, INC.

1) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR GREGORY OLSON, SPECIAL COUNSEL

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by Gregory P. Olson, Special Counsel, for fees of $12,400.00 and expenses of $1,328.74; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Gregory P. Olson may upload an order granting the Application in full as requested.

2) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR WINTHROP COUCHOT, GENERAL INSOLVENCY COUNSEL

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by Winthrop Couchot Professional Corporation, General Insolvency Counsel for the Debtor, for fees of $749,744.50 and expenses of $17,842.62; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Winthrop Couchot Professional Corporation may upload an order granting the Application in full as requested.

ATTORNEY: ROBERT E. OPERA (IMAGENETIX, INC.)

3 - 14-00534-MM Ch 11 KENNETH CHARLES & MARY KATHLEEN NOORIGIAN

STATUS CONFERENCE ON CHAPTER 11 VOLUNTARY PETITION (fr. 10/16/14)

US TRUSTEE: DAVID A. ORTIZ
ATTORNEY: DAVID L. SPECKMAN (KENNETH & MARY NOORIGIAN)

02:00 PM

4 - 14-00534-MM Ch 11 KENNETH CHARLES & MARY KATHLEEN NOORIGIAN

ADV: 14-90037 DELTA COLLINS v. KENNETH NOORIGIAN

PRE-TRIAL ON COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

Tentative Ruling: Creditor Delta M. Collins, Trustee of the Delta M. Collins Living Trust ("Collins"), filed this adversary proceeding against Debtor Kenneth Noorigian ("Noorigian") on March 10, 2014, bringing a single claim for 11 U.S.C. § 523(a)(2)(A) nondischargeability based upon a judgment Collins obtained against Noorigian in state court that is now final. On July 29, 2014, the Court granted summary adjudication of the issues that were precluded by the state court judgment, but denied summary judgment to both parties.

The parties have separately submitted their statements of undisputed facts and their list of issues to be litigated for the final pretrial hearing since they cannot agree on a consensual list. The parties have also filed motions in limine that continue to raise issues about what aspects of this case are precluded.

The Court makes the following pretrial rulings to ensure the upcoming trial is conducted efficaciously for the benefit of the parties and the administration of justice.

I. PRETRIAL PROCESS

As required under Fed. R. Civ. P. 16(c)(1), incorporated by reference into Bankruptcy Rule 7016, the Court gave both parties a full and fair opportunity to develop and present facts and legal arguments in support of each of their position as to the issues resolved and those remaining for trial. They have done so by way of their proposed pretrial orders. Having reviewed the parties' submitted pretrial orders, objections and motions in limine, the Court has determined that some aspects of the state court judgment are nondischargeable, and some are dischargeable, as a matter of law. *See Portsmouth Square, Inc. v. Shareholders Protective Comm.,* 770 F.2d 866, 869-870 (9th Cir. 1985); *see also Osborne v. County of Riverside*, 323 Fed. Appx. 613 (9th Cir. 2009); *Granite State Ins. Co. v. Smart Modular Techs., Inc.,* 76 F.3d 1023, 1031 (9th Cir. 1996) ("[Rule 52] authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.").

The Court will also require further proceedings on some of the other claims. Although the Court must apply issue preclusion where appropriate, Collins is not barred from presenting additional evidence to establish the nondischargeable nature of one or more of the awards; provided those claims are alleged in the Complaint. *See Banks v. Gill Distrib. Ctrs., Inc. (In re Banks)*, 263 F.3d 862, 868-69 (9th Cir. 2001) (previous state court contract judgment does not prevent creditor from raising discharge issues that were not raised early); *see also Delaney-Morin v. Day (In re Delaney-Morin),* 304 B.R. 365, 370-71 (B.A.P. 9th Cir. 2003) ("A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings.").

II. FACTS DETERMINED AS A MATTER OF PRECLUSION PRINCIPLES

1. Noorigian, an attorney, established Manufactured Structures International ("MSI") and its affiliate, Manufactured Structures International SA de CV, a Mexican firm ("MSI-MX"), and was the president of both companies. The objective in forming the companies was to manufacture panelized construction products in Mexico with materials shipped from the United States and to sell the products in the United States for use in housing construction.

2. Collins learned about MSI in 2005 from Rosen Hristov, who was working as a consultant for MSI. Hristov and his wife were close friends of Collins, and Hristov was a "subsequent trustee" and a minor beneficiary of Collins' trust. Hristov told Collins that MSI needed more money and asked if she would be interested in investing in or making a loan to the company. Collins told Hristov that she would be willing to loan MSI money if it was a short-term loan with a good interest rate and there was "excellent security" for the loan.

3. Hristov communicated Collins's interest and concerns to Noorigian and reported back to Collins that Noorigian said he could arrange a short-term loan from Collins to MSI with a high interest rate and that the loan would be secured by what Collins understood would be "something like a mortgage on their cement mixer." Through Hristov, Noorigian provided Collins an invoice for the cement mixer (the "mixer") that showed MSI had purchased it for $158,475. Collins' understanding was that the mixer was brand new, that MSI no longer needed it and would agree not to use it, and that MSI would sell the mixer and repay the loan from the proceeds if MSI was otherwise unable to repay the loan. Hristov told her that Noorigian would prepare the necessary documents for the loan and security interest.

4. In inducing Collins to make the loan, Noorigian made certain false representations, including the representation that the loan would be fully secured by a cement mixer that had never been used and would not be used during the term of the loan.

5. Noorigian or his law firm prepared a promissory note dated September 12, 2005, evidencing Collins' loan of $100,000 to MSI. The note stated that the annual interest rate was 10 percent and that monthly interest payments of $833.33 were due on the first of each month. The note provided that MSI would repay the $100,000 loan plus any accrued and unpaid interest on March 1, 2006, but granted MSI the option to extend the maturity date of the note six months to September 1, 2006. Regarding security, the note stated: "All amounts due under this Note are secured by collateral set forth in a Security Agreement of even date between the parties." The note provided that it was governed by California law and that the parties consented to the jurisdiction of the courts of California in the event of any dispute arising under the note.

6. The promissory note broadly obligated MSI "to pay all costs of collection, all costs of suit, foreclosure or other enforcement of this Promissory Note and/or the Security Agreement and all costs in the event Holder is made a party to any litigation . . . because of the existence of this Promissory Note and/or the Security Agreement. For the purposes of this provision, 'costs' shall include all reasonable attorneys' fees and costs, constants' fees, experts' fees and the like."

7. The security agreement accompanying and purportedly securing the note identified "Delta M. Collins Living Trust" as the secured party, MSI as the debtor, and the mixer as the collateral for the loan. The security agreement stated that the mixer was purchased by MSI and MSI-MX and provided that MSI agreed not to use the mixer while Collins held a security interest in it unless MSI paid down the principal amount due under the note to $50,000.

Noorigian signed the security agreement as president and secretary for MSI, respectively. Noorigian signed the agreement a second time as president of MSI-MX under the words: "ACKNOWLEDGED AND AGREED TO BY [MSI-MX]."

8. In addition to the promissory note and security agreement, Noorigian provided Collins, through Hristov, a Uniform Commercial Code (UC-15) financing statement that identified MSI as the debtor, Collins as the secured party, and the mixer as the collateral. There was no reference on the financing statement to MSI-MX.

9. Noorigian also provided Collins a resolution of the board of directors of MSI, signed by Noorigian as president of MSI, stating that MSI was "authorized to obtain financing up to $100,000 from the Delta M. Collins Living Trust, securing same with Mixer Systems Equipment held at the Mexicali Plant operations[,]" and that "[d]uring the pendency of the loan obligation herein approved, [MSI would] seek to market unused equipment." The corporate resolution was accompanied by a document entitled "Memorandum Re: Sept. 3, 2005 Special Board Meeting," which confirmed that MSI would "pursue the sale of the [mixer] to obtain the best price for the equipment over the term of the Promissory Note held by [Collins]." The memorandum stated that MSI intended "to accept any offer for the subject equipment . . . if the net proceeds for the [mixer] securing the Promissory Note held by [Collins] are equal to at least $120,000."

10. After reviewing the promissory note and related documents that Noorigian provided, in September 2005, Collins made the $100,000 loan of trust funds to MSI.

11. MSI made interest payments as required under the note for six months and then exercised its option to extend the maturity date of the note to September 1, 2006.

12. In April 2006, Noorigian sent Collins a letter in which he referred to MSI-MX as the owner of the mixer that secured the $100,000 note and stated that MSI-MX wanted to put the mixer into production. Noorigian proposed that MSI pay Collins $25,000 to reduce the principal balance of the note to $75,000 and that the maturity date of the note be extended to April 1, 2007. This was the first time Noorigian communicated to her that MSI did not own the mixer.

13. In early July 2006, Hristov returned from a visit to MSI-MX's plant in Mexicali and told Collins that MSI-MX was using the mixer. On July 5, Collins sent Noorigian a "Notice of Default on Promissory Note," declaring that the note "and its accompanying agreements [were] in default" based on information that the mixer was being used in violation of the provision in the security agreement that MSI would not use the mixer while Collins held a security interest in it unless MSI paid down the principal amount due under the note to $50,000. Collins discussed the matter with two attorneys who told her it would be difficult or impossible to collect on the security because it was owned by a Mexican company.

14. MSI did not pay the principal balance of the note when it became due on September 1, 2006.

15. Collins then filed suit against MSI for breach of contract for nonpayment of the note. She also filed a fraud claim against Noorigian was based upon his representation that the loan would be collateralized by an enforceable security interest in a cement mixer that was owned by his US company MSI, and also regarding alleged false promises regarding his agreement not to use the mixer until there was a significant reduction in principal.

16. Jury verdicts were entered in Collins' favor against MSI on her breach of the note claim.

17. Jury verdicts were entered in Collins' favor on her that the security interest in the mixer was unenforceable and worthless because a Mexican entity MSI-MX owned the mixer, the mixer was located in Mexico, and under Mexican law Collins could not enforce a security interest against property owned by a Mexican company and located in Mexico to satisfy a debt owed by a United States debtor like MSI. The fraud jury verdicts found that: (1) Noorigian made a misrepresentation of an important fact to Collins and also intentionally concealed an important fact from her; (2) he knew that the misrepresentation was false when he made it, and he intended to deceive Collins by his concealment; (3) he made the misrepresentation with the intent to induce Collins' reliance; (4) Collins reasonably relied on the misrepresentation and justifiably relied on the concealment; and (5) the misrepresentation and concealment were each a "substantial factor" in causing Collins to suffer losses.

18. The jury found in Noorigian's favor on Collins' false promise fraud claim relating to refraining from using the mixer in Mexico, repayment of the loan and sale of the mixer upon default to repay the loan.

19. Based on the jury's verdict, the state court entered judgment awarding Collins damages jointly and severally against MSI and Noorigian in the amount of $121,435.45, with damages in the exact amount owed Collins under the loan agreement with MSI.

20. After a further judge trial, a Statement of Decision was entered holding that Noorigian is "personally liable to Collins under the doctrine of alter-ego" for the sum that MSI owes based upon alternative state court findings of fraud and commingling of funds and undercapitalization of MSI.

21. The state court stated at p. 12 of its Statement of Decision that some of its findings, and particularly findings nos. 1, 2, 9 and 10 "serve as self-sufficient, independent grounds for its ultimate findings on alter-ego liability." These findings were summarized by the Court of Appeal in p. 28-30 of its decision:

(a) Noorigian manipulated his ownership and control of MSI and MSI-MX to defraud Collins;

(b) the manipulated his ownership and control of the various MSI entities to serve his purposes without proper regard for the separate corporate existences of the various entities;

(c) MSI and MSI-MX commingled assets;

(d) substantial sums of money that MSI deposited into and withdrew from its corporate bank account were not used to fund its purported business efforts regarding the import and distribution of building materials made in Mexico, including substantial sums deposited and withdrawn in 2004 and 2005, during which period

MSI "did not make any sales, or otherwise generate revenues that plausibly explain these deposits and withdrawals, so that it appears that Noorigian or the MSI companies were using these accounts for matters not strictly related to MSI's purported business operations[;]

(e) during that same period, MSI "was usually and generally undercapitalized for its purported business purposes; "

(f) MSI was undercapitalized for its purported business purposes when Collins made the loan to MSI and remained so until it became defunct;

(g) Noorigian and accountant Steven Martinez gave conflicting testimony on the material facts of whether Martinez had acted as the accountant for MSI and an affiliated company and "whether Martinez or any entity in which Martinez held any interest had directly or indirectly extended loans or investments to any of the MSI companies;"

(h) MSI failed to provide documentation explaining how it could have properly pledged the mixer as security or authorized MSI-MX to hold, own, and use the cement mixer despite MSI's obligation to not use the mixer and to pledge it as security for [Collins'] loan;

(i) Noorigian or MSI did not follow proper procedures "to authorize, justify, or give notice that [MSI-MX] did not follow proper procedures "to authorize, justify, or give notice that [MSI-MX] had begun to use the mixer in contravention of MSI's obligation to not use the mixer[;]"

(j) Noorigian gave inconsistent and contradictory testimony about whether and when MSI-MX began to use the mixer; and

(k) MSI did not make the efforts it would be expected to make if it genuinely intended to pursue its purported business operations.

22. The Court of Appeal at p. 36 of its decision determined that the alter ego findings were in the alternative because they were based on separate facts:

> Moreover, Collins' fraud claims were not based on the same set of facts as her breach of contract claim. Her breach of contract cause of action was based on MSI's failure to pay the principal amount the subject loan as agreed in the promissory note, whereas her fraud claims were based on Noorigian's misrepresentations about the collateral that induced her to make the loan. The court did not err in not requiring Collins to elect between her fraud remedy against Noorigian and her contract remedy against MSI.

23. The Court of Appeal also held in p. 31 that it was unnecessary for it to clarify whether the state court's alter ego findings were based upon a combination of fraud and misuse of the corporate form under state law:

> Regarding the court's finding that there would be an inequitable result if Noorigian's acts in question were treated as those of MSI alone, we reiterate that the inequitable-result prong of an alter ego determination may be satisfied by a showing that applying the alter ego doctrine is necessary to prevent *either* fraud *or* injustice. (*Tomaselli v. Transamerica Ins. Co., supra,* 25 Cal.App.4th at p. 1285, fn. 13; *Meadows v. Emett & Chandler, supra,* 99 Cal.App.2d at p. 499.) Because Collins incurred the attorney's fees and costs she was awarded in successfully pursuing her

judicial remedies for the fraud Noorigian was found to have perpetrated against her, the trial court appropriately ruled, with respect to the fee and cost award, that is would be inequitable and unjust not to impose alter-ego liability against Noorigian for MSI's judgment debt owed to Collins. The court did not err in applying the alter ego doctrine to award Collins contractual attorney's fees and costs against Noorigian.

24. The state court entered a judgment on December 14, 2009 for damages against MSI and Noorigian jointly and severally in the amount of $121,435.45 with costs and attorney's fees to be later determined. No punitive damages were awarded.

25. On December 16, 2014, but before the trial court could award attorney's fees and costs, MSI satisfied the liquidated amount of the judgment with payment of $121,502.00. The payment was not allocated to either the fraud or the breach of contract damages.

26. Collins later filed a partial satisfaction of judgment dated as of January 6, 2010 and recorded on January 22, 2013 simply reflecting a reduction in the total debt.

27. On post-judgment motions, the state court ruled that Collins was the prevailing party under Code of Civil Procedure § 998 as to MSI and awarded her attorney's fees, expert fees, and other costs.

28. The state court on May 7, 2010 later quantified fees and costs to be awarded Collins as against MSI and Noorigian as follows: $178,696.25 in attorney's fees, $30,429.30 in expert fees, and $6,429.20 in other costs as a part of the contract under Cal. Civ. Code §§ 1717, 1021, and 1032 to be included as part of the original judgment as of December 14, 2009. Although Noorigian disputed that all of the attorney's fees involved the MSI's breach of contract, under which the attorney's fees were awarded, the Court of Appeals affirmed the state court's award, finding that the fees were not divisible.

29. All of the parties separately appealed the judgment but Collins' claims against Noorigian were affirmed on appeal and are final.

30. After Collins' appeal, in which the demurrer on behalf of Mandel was reversed, Mandel settled with Collins in the amount of $65,000. Mandel and Collins stipulated that Noorigian would only be given $5,000 credit on the judgment. This stipulation was not agreed to by Noorigian although his bankruptcy counsel represented Mandel in the matter. The stipulation was not approved pursuant to Cal. Code Civ. Pro. 877.

31. Additional appellate attorney's fees and costs in the amount of $167,234.19 were awarded against Noorigian and MSI on March 15, 2013.

32. No fees have been awarded to Collins in this bankruptcy, although she asserts $27,548 of fees have been incurred to date.

III. TIME ESTIMATES

The parties have agreed that this case would take two days or approximately 12 hours to try. As a result, the Court will set a 6 hour time limit for each party for the trial. The time will be monitored by the Court. Time will be allocated before the start of trial as per the parties' preferences to opening statement, offering of and objection to evidence,

and closing argument. Time spent on objections, questioning a witness, and otherwise addressing the Court will be counted towards that party's time limit. If any counsel does not appear on a timely basis, the delay is also deducted from his client's time limit. Time spent by the Court's ruling on objections will be counted against the party who does not prevail.

IV. BURDEN OF PROOF

Collins has the burden of proof on all issues raised in her affirmative case. *See Grogan v. Garner,* 498 U.S. 279, 283 (1991) (burden of proof on the plaintiff). Because the underlying purpose of the Bankruptcy Code is to grant the debtor a "fresh start," courts construe exceptions to discharge narrowly. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1197 (9th Cir. 2010) (quoting *Bernard v. Sheaffer (In re Bernard)*, 96 F.3d 1279, 1281 (9th Cir. 1996)). The moving party also bears the burden of proof on all elements of issue preclusion.

V. PRECLUDED ISSUES

Both parties brought motions in limine and objections, detailed in the Pretrial Motions section below, seeking to preclude the other party from presenting evidence regarding facts that had been previously decided in the state court. For this reason, the Court is compelled to specify exactly which issues are precluded.

The following issues are established by preclusion and no evidence will be admitted. *See Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir. 2011) ("Issue preclusion is designed to "bar 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination.'" citing 18 James Wm. Moore et al., Moore's Federal Practice § 132.02[2][c] (3d ed. 2010) ("If a new legal theory or factual assertion raised in the second action is relevant to the issues that were litigated and adjudicated previously, the prior determination of the issue is conclusive on the issue despite the fact that new evidence or argument relevant to the issue was not in fact expressly pleaded, introduced into evidence, or otherwise urged."); Restat. 2d of Judgments, § 27 (1982) ("[I]f the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact.").

A. Fraud in the Inducement

To the extent unpaid, the fraud judgment is nondischargeable as a matter of preclusion. Collins' 11 U.S.C. § 523(a)(2)(A) claim matches all five elements of fraud in the inducement to enter into the loan and security agreement and the jury verdict findings establish the elements to make the fraud debt nondischargeable. *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000) (citing *Am. Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1997)).

B. Reasonableness of Attorney's fees and Cost Award

The state court found the attorney's fees and costs awarded to be reasonable and preclusion applies to prevent re-litigation of their amount or reasonableness. *Sasson v. Sokoloff (In re Sasson), 424 F.3d 864,872 (9th Cir. 2005)* ("The classic example of the proper use of issue preclusion in discharge proceeding is when the amount of the debt has been determined by the state court and reduced to judgment."); *Banks v. Gill Distrib. Ctrs., Inc. (In re Banks)*, 263 F.3d 862, 868 (9th Cir. Cal. 2001) ("[T]here are two distinct issues to consider in the dischargeability

analysis: first, the establishment of the debt itself, which is subject to the applicable state statute of limitations; and, second, a determination as to the nature of that debt, an issue within the exclusive jurisdiction of the bankruptcy court and thus governed by Bankruptcy Rule 4007.).

C. Offer to Compromise

Because the judgment is preclusive as to its amounts, *Sasson,* 424 F.3d at 872*,* any evidence regarding Noorigian's Code Civ. Pro. 998 offer to compromise is irrelevant and not admissible. In any case, the Court of Appeals rejected this argument on appeal.

D. Punitive Damages

Preclusion applies to prevent Collins from attempting to prove that Noorigian acted willfully or maliciously in regard to his dealings with Collins because no punitive damages were awarded.

E. False Promise

Preclusion applies to prevent any Collins from attempting to prove that Noorigian made false promises as alleged in the state court complaint.

F. Alter Ego as to Contract Damages Including Attorney's Fees

Noorigian is liable for the entire debt awarded Collins in state court to be paid as required by bankruptcy law, including all costs and attorney's fees, as a matter of preclusion. However, only that portion of the debt that meets the elements of 11 U.S.C. § 523(a)(2)(A) will be excepted from discharge to the extent it is not repaid in the bankruptcy plan.

VI. Pretrial Motions

A. Debtor's Motion in Limine

Debtor filed a motion in limine to exclude the state court testimony of Robert Taylor, William Klorman, Irwin Mandel, Nicholas King, Rosen Hristov and Delta Collins, claiming it was hearsay.

The state court testimony of each of the witness is hearsay because (1) the statements were not made while testifying at the current trial and (2) they are offered in evidence to prove the truth of the matter asserted in the statement.. Although it meets the definition of hearsay, it may qualify as a hearsay exception under FRE 804(b)(1) as testimony that was given as a witness at a trial and is now offered against a party who had an opportunity and similar motive to develop it; provided that the witness is unavailable. Under FRE 804(a)(5)(A), a witness is unavailable if he or she is absent from trial and proponent has not been able, by process or other means, to procure declarant's attendance. The proponent must establish his reasonable good faith steps taken to procure the witness's presences. *See* 2 Barry Russell, Bankruptcy Evidence Manual, Hearsay, at 945 (2010-2011 ed.) (*citing United States v. Solomon*, 24 Fed Appx 148, 149 (4th Cir. 2001)).

Based on the declarations of William Klorman, Delta Collins, and Nicholas King they appear to be available for the trial for various reasons, and none appears to be outside of this Court's subpoena power. Nevertheless, Klorman has scheduling issues, and Collins and King claim to suffer from memory problems. Unless Collins can establish their unavailability based upon her reasonable good faith steps taken to procure the witnesses' presences on other grounds, their state court testimony will be excluded as hearsay.

Hristov Rosen now lives in Moscow and Irwin Mandel lives in Palm

Springs which is outside of this court's jurisdiction for service of process. Nevertheless, Collins has not presented evidence that she took reasonable steps to procure the witnesses' presence at a time they were in this jurisdiction. Collins will need to present evidence of this before these witnesses' state court testimony will be admitted.

To the extent any of these witnesses testify in Court, the state court testimony may be used in situations in which it is excluded as hearsay under FRE 801(d)(1) as the prior testimony is (A) inconsistent with the declarant's current testimony or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. Delta Collins' state court testimony may also be admitted despite the hearsay rule if offered by Noorigian as a statement against a party opponent under FRE 801(d)(2).

B. Collins' Objections to Noorigian's Evidence

Collins objected to Noorigian's submission of his witness list, proposed declarations, and proposed exhibits to this Court after failing to show *any* of these items to Collins before doing so in violation of Local Rule 7016-7(b) and (d). Collins argues that all submissions should be excluded and specifically that Collins suffered prejudice to the extent that Luis Almaraz is allowed to testify about the validity of the security interest without Collins being to designate her own expert witness for that purpose. As set forth above, that fact has already been established in the state court, however, and the Court will not allow any further evidence on it on preclusion grounds. As a result, no prejudice has been shown, and the Court will not sanction Noorigian for failure to comply.

Collins also objected to the declaration of Luis Almaraz and the declaration of Noorigian, as well as Exhibit B (an e-mail correspondence by which Noorigian confirmed that MSI wishes to extend the term of the Collins loan); Exhibit E (accounting from a Mexican accountant to MSI-MX concerning its 2010 affairs); Exhibit F (Mexican visa and agreement between MSI and MSI-MX); Exhibit G (photographs of plan operated by MSI-MX); Exhibit H (MSI-MX promotional literature); Exhibit I (Noorigian's redaction of Hristov Rosen's drafting of MSI-MX's promotional literature). The main objection to the exhibits and the declarations was that the facts were precluded by the state court findings. As stated above, the Court will not admit any evidence that attempts to relitigate the facts it has found to be established. Collins has also objected to all the exhibits due to lack of authentication. Although none of the exhibits have been authenticated yet, they may be authenticated at trial and the Court will admit the exhibits to the extent that they address Noorigian's defense or Collins' assertion of the alter ego fraud claim, as explained below.

C. Collins' Request for Judicial Notice of California Law

Collins requested judicial notice of various provisions of California law. Although the Court is quite familiar these provisions of California law, judicial notice governs adjudicative facts, not legislative facts. *See* FRE 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact."). As such, judicial notice is not applicable.

D. Collins' Motion to File Settlement Under Seal

Collins filed a motion to file under seal her confidential settlement agreement with Irwin Mandel. Based upon the record before the Court, the Motion does not meet the narrow exceptions against presumption of public access of documents filed in a bankruptcy case. Section 107 codifies a presumption of public access to all documents filed in a bankruptcy case or with a bankruptcy court. 11 U.S.C. § 107. In the bankruptcy context, all filings are subject to § 107, which provides that any paper filed in a case under title 11 is presumed to be "open to examination by an entity at reasonable times without charge." 11 U.S.C. §

107; *see also Gitto v. Worcester Tel. & Gazette Corp. (In re Gitto Global Corp.),* 422 F.3d 1, 7 (1st. Cir. 2005) (holding that § 107 establishes a broad right to public access with limited exceptions set forth in § 107).

Rule 9018 of the Federal Rules of Bankruptcy Procedure implements § 107 and provides that the Court "may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation." Rule 9018 "does not expand a bankruptcy court's ability to limit access to papers filed beyond the powers conferred in § 107, nor does it provide a separate basis for relief." *Togut v. Deutsche Bank AG (In re Anthracite Capital, Inc.),* 492 B.R. 162, 171 (Bankr. S.D.N.Y. 2013).

Public access to judicial records "is of special importance in the bankruptcy arena, as unrestricted access to judicial records fosters confidence among creditors regarding the fairness of the bankruptcy system." *Gitto,* 422 F.3d at 7, *citing In re Crawford,* 194 F.3d. 954, 960 (9th Cir. 1999). As the Ninth Circuit explained in *Crawford, §* 107 is not impermissibly overbroad, and "a blanket open access rule obviously fosters public confidence in a way that a regime shot through with exceptions might not." *Ferm v. United States Trustee (In re Crawford),* 194 F.3d 954, 960 (9th Cir. 1999). However, this presumption of public access is not absolute. Section 107 (b) and (c) include three narrow exceptions: (1) to protect an entity's trade secret, confidential research, development, or commercial development; (2) to protect a person from scandalous or defamatory matters; and (3) to protect an individual from identity theft. 11 U.S.C. §§ 107(b)-(c); *Gitto,* 422 F.3d at 7; *In the Matter of Roman Catholic Archbishop of Portland in Oregon,* 661 F.3d 417, 430 (9th Cir. 2011).

Because the Court's ability to limit public access is an extraordinary measure, *In re Anthracite Capital,* 492 B.R. at 171, the Court should narrowly apply the exceptions set forth in §§ 107(b) and (c). *See Crawford,* 194 F.3d at 960 n.8 (noting that the exceptions in § 107(b) are "construed narrowly" so that those exceptions do not affect the analysis regarding the public confidence fostered by the broad scope of § 107). The moving party requesting relief to seal documents under § 107 has the burden of proof. *In re Food Mgmt. Group,* 359 B.R. 543, 561 (Bankr. S.D.N.Y. 2007). The party seeking to seal documents must show a "compelling need" for protection and "extraordinary circumstances." *See id. citing In re Orion Pictures Corp.,* 21 F.3d 24

ATTORNEY: WILLIAM A. MARKHAM (DELTA COLLINS)
ATTORNEY: DAVID L. SPECKMAN (KENNETH NOORIGIAN)

02:00 PM

5 - 14-07199-MM Ch 11 LAKSHMI HOSPITALITY GROUP, LLC

TELE

1) MOTION FOR ESTABLISHMENT OF INTERIM FEE PROCEDURE IN CONFORMITY WITH APPENDIX D5 OF THE LOCAL BANKRUPTCY RULES FILED BY DEBTOR

Tentative Ruling: The unopposed motion for establishment of fee procedures is well founded and will be approved.

2) APPLICATION TO EMPLOY FRIEDMAN LAW GROUP, PC FILED BY DEBTOR

Tentative Ruling: A stipulation has been submitted resolving the US Trustee's objections and the employment will be approved.

3) STATUS CONFERENCE ON CHAPTER 11 VOLUNTARY PETITION (fr. 10/30/14)

Tentative Ruling: To be heard.

4) MOTION TO AUTHORIZE DEBTOR TO MAINTAIN ITS CASH MANAGEMENT SYSTEM FILED BY DEBTOR (fr. 10/30/14)

Tentative Ruling: To be heard.

5) MOTION FOR USE OF CASH COLLATERAL FILED BY DEBTOR (fr. 10/30/14)

Tentative Ruling: As stated at the last hearing on the motion to transfer venue, the Court is not inclined, without establishment of good cause from the submission of evidence, to deviate from its standard procedures for use of cash collateral attached as an Appendix to its local rules. The record before the Court does not show good cause due to the presence of a value cushion to serve as adequate protection for Enterprise Bank's liens. Among the concerns the Court has are the waiver of challenges to the secured claim, the waiver of surcharge rights, and what appear to be burdensome monthly reporting deadlines.

US TRUSTEE: HAEJI HONG
ATTORNEY: J. BENNETT FRIEDMAN (LAKSHMI HOSPITALITY GROUP, LLC)
ATTORNEY: LISA YUN (MARRIOTT INTERNATIONAL, INC.)
ATTORNEY: MARTIN A. ELIOPULOS (ENTERPRISE BANK & TRUST)

6 - 14-08030-MM Ch 11 SHIVA-OM INC. DBA ESCONDIDO LODGE

1) STATUS CONFERENCE ON CHAPTER 11 VOLUNTARY PETITION

Tentative Ruling: Continued to December 11, 2014 at 2:00 p.m., Department 1. A further status report is due to be filed not later than December 4, 2014. Appearances at the November 13, 2014 hearing are excused.

2) APPLICATION TO EMPLOY THE LAW OFFICES OF ANDREW H. GRIFFIN, III AS GENERAL COUNSEL TO DEBTOR

Tentative Ruling: The unopposed motion to employ the law offices of Andrew H. Griffin, III as general counsel to the Debtor is based upon good cause and is granted. Appearances are excused.

ATTORNEY: ANDREW H. GRIFFIN (SHIVA-OM, INC.)

03:00 PM

1 - 14-08117-MM Ch 13 JULIAN DE ANDA

MOTION TO EXTEND AUTOMATIC STAY FILED BY DEBTOR

ATTORNEY: JOHN F. BRADY (JULIAN DE ANDA)

03:00 PM

2 - 14-08651-MM Ch 11 BIOSERV CORPORATION

1) MOTION FOR RELIEF FROM STAY, RS #RCT-1 FILED BY EASTGATE BEND TWO

2) MOTION TO EXTEND DEADLINE TO PAY POST-PETITION RENT OBLIGATIONS FILED BY DEBTOR

ATTORNEY: BENJAMIN CARSON (BIOSERV CORPORATION)
ATTORNEY: ROBERT C. THORN (EASTGATE BEND TWO)